IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 175 of 1987

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HEIRS OF HAJI ISMAIL H MOHMED

Versus

HEIRS OF ISMAIL UMARJI BAPU

Appearance:

MS KJ BRAHMBHATT for MS VASUBEN P SHAH for the Petitioner

MRS PJ DAVAWALA for the Respondents

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 21/10/2002

ORAL JUDGEMENT

This Revision Application has been preferred by the appellant - plaintiff under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act,

1947 (hereinafter referred to as 'the Rent Act') against the judgment and order dated 28th November, 1986 passed by the learned District Judge, Bharuch in Regular Civil Appeal No.121/1985.

The premises in question (hereinafter referred to as 'the suit house') is a house bearing Municipal Census No.E/698 (revised Municipal Census No.E/1348) situated at Bharuch. The plaintiffs are the owners of the suit house. The defendants are the statutory tenants of the suit house. The plaintiffs instituted Regular Civil Suit No.632/1981 in the Court of Civil Judge (S.D.), Bharuch. According to the plaintiffs the defendants had made certain constructions in the suit house without the permission of the plaintiffs. The defendants were, therefore, liable to be evicted from the suit house.

The suit was contested by the defendants by filing written statement (Ex.9). It was denied, inter alia, that the defendants had erected any permanent structure in the suit house rendering him liable for eviction. The learned trial Judge was, under the judgment and order dated 20th June, 1985, pleased to hold that the construction in dispute was a partition wall in the space known as godown on the ground floor and a room constructed over wooden pillars on the first floor of the suit house and that the said construction can not be said to be permanent structure as envisaged under Section 13(1)(b) of the Rent Act. Hence, the learned Judge dismissed the suit.

Feeling aggrieved, the plaintiffs preferred Regular Civil Appeal No.121/1985 in the Court of District Judge, Bharuch. The learned District Judge was pleased to dismiss the appeal under the impugned judgment and order dated 28th November, 1986. Feeling aggrieved, the appellants - plaintiffs have preferred the present Revision Application.

It appears that originally the suit house contained a room and an 'adali'. The said house was leased in the year 1947 for a monthly rent of Rs.27=00, for which, the rent note was executed on 1st October, 1947. In the year 1962, a fresh rent note was executed. Under the fresh lease, the tenant was also given the space known as godown. The tenant was also given two additional rooms with sanitary facilities, constructed on five R.C.C. pillars above 'adali'. The plaintiffs instituted Regular Civil Suit No.175/1971 for recovery of possession of the suit house, inter alia, on the ground that the tenant had made permanent structure in the suit

house without the permission of the plaintiffs. The said suit was dismissed by the trial Court, the lower Appellate Court and this High Court as well. All the three Courts held that the disputed construction had been made by the landlord and not by the tenant. This Court (Coram : D.P.Desai, J.), in its judgment dated 18th April, 1979, passed in Civil Revision Application No.480/1977 observed that "as to when the impugned structure was raised, both the Courts below have come to a concurrent finding of fact." The Court further observed that "in these circumstances, it can not be said that the conclusion of fact reached by the Courts below is one which can be interfered with in revision." It is established in the present proceedings that since the completion of the previous litigation the tenant had constructed one room on the first floor of the suit house. The said room has been constructed on wooden pillars using brick walls, iron sheets roof and cement tiles.

The question is whether the construction of the said room by the tenant can be said to be the construction of a permanent nature as envisaged under Section 13(1)(b) of the Rent Act. The learned trial Judge has proceeded on the premise that the earlier addition to the suit house, namely, construction of rooms supported by R.C.C. pillars was not held to be permanent structure in the earlier proceedings. Therefore, the construction of the disputed room can not be said to be permanent structure. However, though the lower Appellate Court has dismissed the appeal, has approached the issue in a different manner. The lower Appellate Court was of the opinion that though the materials used for the construction of the disputed room was of durable nature, it could be removed without causing damage to the suit house. Therefore, the construction can not be said to be permanent so as to entail a decree of eviction.

In my view, the approach of both the Courts below is erroneous. The learned trial Judge has observed that "...It is evident from the copies of the judgments produced in this case that it was established in the previous suit that the deceased defendant erected rooms on the R.C.C. pillars on the suit premises. Eventhen, previous suit it was held that the said structures were not of permanent nature. In this case it is established from the evidence of the plaintiff and his witnesses and the map prepared by the Court Commissioner that the deceased defendant constructed one room on wooden pillars in the suit premises and also erected a partition wall in the front room in the suit premises. The deceased

defendant has admitted in his written statement that he removed the old iron sheets on the adala and replaced three to four new iron sheets. It is established that the deceased defendant erected one room on the wooden pillars in the suit premises... Admittedly, in this case the disputed structure is wooden structure... There is no evidence to show that the disputed structure can not be removed without causing serious damage to the suit premises." Thus, the learned Judge has made twofold error - (1) by proceeding on the wrong premise that the R.C.C. structure was held not to be a permanent structure. As observed hereinabove the earlier proceedings ended in dismissal of the suit for eviction on the ground that the disputed construction was made by the landlord and not by the tenant; (2) the learned Judge has erred in invoking explanation to Section 13(1). The approach of the lower Appellate Court also, in my view, is erroneous in as much as the learned Judge has concentrated only on the fact that the disputed construction can be removed though it is a 'pacca' construction, though the materials used are of durable nature.

Ms.Brahmbhatt has relied upon the judgments of this Court in the matters of PATEL ISHWARBHAI LALLUBHAI AND ANOTHER V/S. PATEL PARSHOTTAM RANCHHODBHAI AND ORS. [8 G.L.R. 665] and of DALSUKHRAI G.GHELANI V/S. BHIKHALAL HARILAL MASHRU [2001(2) G.L.R. 1344] and of Allahabad High Court in the matter of SITARAM SHARAN AND ANR. V/S. JOHRI MAL AND ANR. [A.I.R. 1972 ALLAHABAD 317].

Mrs.Davawala has also relied upon the judgment of the Andhra Pradesh High Court in the matter of EASHWAR V/S. B.SUDERSHAN AND ANR. [A.I.R. 1985 ANDHRA PRADESH 4] and of the Bombay High Court in the matter of ALISAHEB ABDUL LATIF MULLA V/S. ABDUL KARIM ABDUL RAHMAN MULLA AND ORS. [A.I.R. 1981 BOMBAY 253]. She has also relied upon the judgment of this Court in the matter of SMT.LAXMIBEN MAVJIBHAI AND ANR. V/S. SHANKARBHAI MULUBHAI [1995(2) G.L.R. 1320].

In the matter of Patel Ishwarbhai Lallubhai (supra), this Court has held that "...Now, removability can not per se be a test in the matter. Nor is it necessary that a particular type of material is to be used to give the structure an element of permanence or to make it of such a nature as to be of a lasting nature... The nature of the materials to be used depends upon the change in the mode of life, the economic conditions of the persons concerned, the availability of the materials at a given time and such other factors. In my view, the

expression 'permanent structure' is used to denote some work which is not of a temporary nature... It would, therefore, not be proper to say that, because in the offending structure, beams of wood and such other materials aforesaid were used and not the cement or the steel frame, therefore it could not be considered to be a permanent structure." The Court further held that "...Thus, the purpose for which the construction has been put up will also indicate the element of permanence in the matter."

In the matter of Sitaram Sharan (supra), the disputed construction was sheds made by constructing certain walls with a tin roof thereon and the fixing of doors and windows. The Hon'ble Court held that "...In our opinion, since the constructions made by the respondents materially altered the accommodation let out to them and the constructions were made without the consent of the appellants in writing, the appellants have succeeded in establishing all the conditions necessary for the applicability of Section 3(1)(c)."

In the matter of Dalsukhrai G.Ghelani (supra), the Court found that "the tenant had raised disputed structure right from the foundation after demolishing at least four walls and the roof. The old walls were no doubt 'kachcha' but the new walls have been constructed with the help of cement, concrete, lime bricks, etc. ...If the test of removability is applied in the instant case to determine the nature of structure, it can be said that if the structure raised by the tenant is demolished or removed, then practically there will be open land and not the old construction. Consequently, even the test of removability will indicate that even by demolishing the new structure raised by the tenant the whole identity of the old structure let out to the tenant has lost its existence."

In the matter of Eshwar (supra), the tenant's putting up roof which had fallen down in a part of the building without permission of a landlord was held not to be a transgression of any provision of law.

In the matter of Alisaheb Abdul Latif Mulla (supra), the extension of the existing 'mori' to provide a separate bathing area by construction of a 6' high wall was held not to constitute a permanent structure. The learned single Judge of the Bombay High Court observed that "the question whether a particular work carried out in relation to any premises is a permanent structure or otherwise, can also be considered by reference to two

words occurring in the English law differentiating the two kinds of structure of fixation and they are "fixture" and "chattel". Where a thing is attached permanently and thereby effects a substantial improvement to the premises, then such a thing which has been affixed and which is of a permanent nature, thereby effecting a substantial improvement to the premises must be described as a fixture. On the other hand, that which is fixed for a temporary purpose and for a more beneficial enjoyment of the premises, can be described as chattel... It is, therefore, the degree of annexation of the object, which is described as a permanent structure to the premises, which were existing, which appears to be a more essential test." The said Court also held that "...Merely because, therefore, a wall is erected and that wall is built either in cement, sand or brick and mortar, it does not follow that the work must be styled as 'permanent construction'."

In the matter of Smt.Laxmiben Mavjibhai (supra), replacing the door of a shop by rolling shutter and construction of a loft by inserting beams were held to be the changes not amounting to erecting permanent structure. The learned Judge has invoked explanation to Section 13(1) and has held that minor alteration in existing structure for more beneficial enjoyment thereon can not be considered to be erection of a permanent structure within the meaning of Section 13(1)(b). A reference Can be had to the judgment of the Division Bench of this Court in the matter of KHURESHI IBRAHIM AHMEDA V/S. AHMED HAJI KHANMAHOMAD [6 G.L.R. 27]. In the said matter, the Division Bench applied the objective test and held that the structure made of bamboos and iron sheets can not be said to be permanent structure. The learned Judges have held that "...It is, therefore, clear that the structure in order to be a permanent structure within the meaning of the section must have an element of permanence in it. It must be intended to be a lasting structure and that would depend on the nature of the structure. The permanent or temporary character of the structure would have to be determined having regard to the nature of the structure and the nature of the materials used in the making of the structure and the manner in which the structure is erected and not on the basis of how long the tenant intended to make use of the structure. As a matter of fact the nature of the structure itself would reflect whether the tenant intended that it should exist and be available for use for a temporary period or for an indefinite period of time. The test provided by the Legislature is thus an objective test and not a subjective one and once it is

shown that the structure erected by the tenant is of such a nature as to be lasting in duration-lasting of course according to ordinary notions of mankind-the tenant can not come forward and say that he erected it for use for only a temporary period and it is, therefore, a temporary structure."

Section 13(1) of the Rent Act enumerates the circumstances, existence of which, if proved, would entitle a landlord to claim recovery of the possession of the tenanted premises. Section 13(1)(b) and the explanation to the said sub-section (1) read as under :

"Section 13(1)(b) - that, save as otherwise provided in Section 23A, the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure."

"For the purpose of clause (b) no permanent structure shall be deemed to be erected on any premises merely by reason of the construction of a partition wall, door or lattice work or the filling of kitchen-stand or such other alterations made in the premises as can be removed without serious damage to the premises".

Hence, the landlord who claims recovery of possession of the rented premises is required to prove that the tenant has made certain constructions without the permission of the landlord in writing and that the construction is of permanent nature. The above explanation refers to certain structures made by a tenant which should not be considered to be a permanent structure if removable without serious damage to the premises. The words "permanent structure" have not been defined in the statute. The said words are, therefore, required to be given their natural meaning. The Courts have evolved various tests to examine whether the disputed structure can be said to be a permanent structure or not. The tests evolved are objective as well as subjective. Objective in the sense of the nature of the materials used and subjective in the sense that whether the disputed structure is intended to be used permanently.

Ms.Brahmbhatt has submitted that apply either of the tests, the disputed construction in the present case is undoubtedly a permanent structure. However, Mrs.Davawala has submitted that the materials used in the construction is not relevant but, what is relevant is whether the construction can be removed without any serious damage to the premises. If the said test is

applied, the disputed construction can not be said to be a permanent structure.

I am afraid, I can not accept the submission made by Mrs.Davawala. The concept of removal of structure without serious damage to the premises flows from the explanation to Section 13(1) reproduced hereinabove. The explanation can be invoked only in case where the disputed construction is found to be only a partition wall, door or lattice work, filling of kitchen stand or such other alterations. In my view, the alterations referred to in the said explanation can be classified as those which are made with a view to making better use of the premises, which can be removed. On removal of such alterations, the premises can be restored to its original form without causing serious damage to the premises.

In the present case, the disputed construction is that of a room complete with walls, flooring, roof and a support in the form of pillars. It, therefore, can not be said to be a mere alteration made for better enjoyment of the existing premises but, is an addition to the existing premises. If we apply the objective test then also it is made of materials which are durable and of lasting nature indicating that the room has been added for perpetual use and enjoyment. I am, therefore, of the opinion that the defendants have, without the consent of the plaintiffs, erected permanent structure on the existing premises. The question of removability of such permanent structure shall not arise. As it is held in the matter of Patel Ishwarbhai Lallubhai (supra), the removability can not be the only consideration because as such any construction, whatever be its nature, is removable.

Mrs.Davawala has also made an attempt to show that the disputed construction is, in fact, the construction which was made earlier referred to in the earlier proceedings of 1971. The said construction, therefore, can not be the subject matter of the present litigation. I must say that Mrs.Davawala has failed in this attempt also. It is proved by the panchnama (Ex.82) and the reports of the Court Commissioner and the maps (Exhibits 24/2, 46 and 47) that the disputed room was not in existence at the time of the earlier proceedings. Thus, it is established that the disputed room had been constructed by the defendant without the consent of the plaintiffs.

In the result, I hold that the defendant has, without the consent of the plaintiffs in writing, erected

permanent structure on the suit premises entailing a decree of eviction. The defendants are, therefore, liable to be evicted from the suit premises.

The Revision Application is allowed with costs. The impugned judgment and order dated 28th November, 1985 passed by the learned District Judge, Bharuch in Regular Civil Appeal No.121/1985 and the judgment and order dated 20th June, 1985 passed by the learned Civil Judge (S.D.), Bharuch in Regular Civil Suit No.632/1981 are quashed and set aside. The Regular Civil Suit No.632/1981 is allowed. The plaintiffs do recover possession of the suit premises. Rule is made absolute.

The learned advocate Mrs.Davawala seeks stay of the implementation and execution of this order. Request is granted. The implementation and execution of this order shall stand stayed till 15th January, 2003.

(Ms. R.M.Doshit, J.)

/sakkaf